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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re K.J. et al., Persons Coming
Under the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

L.D.,

Defendant and Appellant.

C068574

(Super. Ct. Nos. JD231381,
JD231382, JD231383)

L.D., the mother of T.D. (age nine), D.W. (age six) and K.J. (age two), appeals from dispositional orders of the Sacramento County Juvenile Court bypassing her reunification services, setting a selection and implementation hearing for T.D., and placing D.W. and K.J. with their respective fathers. (Welf. & Inst. Code, §§ 361.5, subd. (b)(6) (hereafter section 361.5(b)), 366.26.)¹

¹ Undesignated statutory references are to the Welfare and Institutions Code.

On appeal, mother contends the bypass of reunification services was error because (1) she did not inflict the requisite "severe" physical abuse, and (2) she was capable of benefiting from reunification services. Neither claim has merit.

FACTUAL AND PROCEDURAL BACKGROUND

Originating Circumstances

On March 4, 2011, a mandated reporter sent the Sacramento County Department of Health and Human Services (the Department) a referral for physical abuse. A Sacramento police officer placed the three children in protective custody. T.D. told the officer that on March 3, 2011, mother had kicked her in the side and had hit her several times with a belt causing visible injuries. T.D. had bruising on the right side of her face near her temple, her upper and lower left arm, her right thigh, her left hip, and under her right eye. T.D. told the emergency response social worker that, besides inflicting these injuries, mother also had disciplined D.W. with a belt.

Petitions

On March 8, 2011, petitions were filed alleging that each child came within juvenile court jurisdiction under section 300, subdivision (a) (hereafter section 300(a)), in that T.D. sustained serious physical injury inflicted by mother, who also batters D.W. with a belt. In addition, K.J. had been observed to have bruising along his spine and back. The abuse places the children at substantial risk of further serious physical injuries inflicted nonaccidentally by mother.

Detention

At an initial hearing on March 9, 2011, K.J. was released to the care of his presumed father. The hearing for T.D. and D.W. was continued. On March 11, 2011, T.D. and D.W. were detained in foster care.

Jurisdiction and Disposition

On March 10, 2011, the social worker interviewed mother for the jurisdiction/disposition report. Mother appeared to be angry during the interview. She questioned why D.W. and K.J. were removed from her care and stated, "'You'all can keep [T.D.]'" Mother denied physically abusing K.J. and said the marks on K.J.'s back had been there since birth. She denied hitting her children and reported that T.D.'s injuries were self-inflicted.

The next week, the social worker again interviewed mother who appeared to be polite and respectful. During the interview, mother described the events of the day in question. She explained that she stores candy on the top of her closet and parcels out candy to the children in moderation. Around March 2, 2011, following a dinner with friends, T.D. went upstairs to the bathroom and closed the door. The family practice is to leave the bathroom door open even if a person is using the toilet. Mother opened the door and found T.D. on the toilet. When mother told T.D. to get off of the toilet, T.D. tried to flush the toilet. Mother grabbed T.D. by her upper right arm and yanked her off of the toilet. Mother then saw candy in the toilet bowl. She told T.D. to leave the bathroom.

Mother told the social worker, "'I got so mad I said, 'You're going [to] have to go. You're going have [sic] to move in with my mother or something. I can't do this.''" Mother then struck T.D. on her left shoulder and she fell down. Mother claimed that, in choosing to fall down, T.D. was being overly dramatic because she had not been struck hard enough to be knocked down. Mother denied that she had caused any of T.D.'s bruises. The next morning, mother groomed T.D.'s hair for school and T.D. had no bruises. Mother stated that T.D. has a history of hurting herself and that the bruises she had later that day probably had been self-inflicted.

Mother explained, "'You can't really hit [T.D.], because she will hit back.'" Mother described an incident in which she had tried to "'whoop'" T.D. and she fought back.

Mother reported that she wanted to send T.D. to live with the maternal grandmother because the grandmother was a better disciplinarian than was mother. Mother did not know whether the grandmother would "'whoop'" T.D., but mother hoped that T.D. would appreciate mother more after living with the grandmother.

Mother told the social worker that, at age five, she had been removed from the maternal grandmother's care due to physical abuse. Mother claimed that, during her childhood, she and her siblings had been involved in multiple physical confrontations with other children in the neighborhood.

Mother denied beating D.W. or K.J. Mother said that the marks on K.J.'s back and spine had been there since birth.

K.J.'s father confirmed that K.J. was born with marks on his back, elbows, and knees.

The social worker interviewed D.W. on March 25, 2011. D.W. said that mother had beaten her with a belt one time. Mother struck her on her thighs and knees while she was wearing pants. D.W. said that she did not receive any marks or injuries as a result of the beating.

The social worker interviewed T.D. the same day. T.D. said that mother "'whooped'" her because she had stolen mother's candy. T.D. said she had bruises on the right side of her face, up and down her left arm, and on her left hip.

T.D. estimated that mother had beaten her with a belt on 20 to 30 occasions. Ordinarily, she would be beaten everywhere on her body except for her face. She would be in fear every time mother retrieved the belt. T.D. claimed that, on every occasion she had been beaten, mother also had beaten D.W. However, mother would not hit K.J., who was born with marks on his back.

The responding police officer told the social worker that, upon contacting T.D., he had noticed that she had purplish colored bruising on the right side of her face near her eye. T.D. told the officer that she had taken candy that had been next to mother's bed. When mother learned that T.D. had taken candy, she retrieved a black belt from her bedroom. Mother struck T.D. on her face, arms, and legs. She was struck approximately 10 times and the side of her body was kicked.

T.D. said that mother previously had used the belt on her and D.W.

Police officers proceeded to mother's residence, which was described as "'filthy.'" Dirty clothes and garbage covered both the upstairs and downstairs floors of the house. The kitchen had dirty dishes, pots, and pans. Empty alcoholic beverage containers were on the countertop and in the garbage can.

An officer obtained a statement from mother. She reported that she had come home late at night and T.D. went upstairs to the bathroom. Mother went to the bathroom and saw T.D. trying to hide wrappers from candy that she had stolen from mother's room. Mother retrieved a belt and hit T.D. on her thighs. T.D. kicked mother in the stomach. Mother admitted that she had struck T.D. with a belt on two prior occasions.

Photographs of T.D. were taken on March 5, 2011. They show bruising up and down the left arm, bruising on the face under the eye, and bruising on the side of the abdomen. The belt used to inflict the injuries was photographed.

The father of D.W. reported that when he lived with mother she had been verbally and physically abusive toward him.

After the children were placed in protective custody, mother was allowed to have visitation. The visitation supervisor described mother as being "rather disconnected" from her children and "'not loving at all.'" During the first three visits, mother spent most of her time talking on her cell phone.

Mother had to be instructed to not use the phone during visits. On one occasion, T.D. had an accident because she did not get to the bathroom on time. Mother made humiliating statements to T.D. about the incident.

On May 5, 2011, D.W. was placed in the residence of her father.

On May 26, 2011, the petitions were amended by striking the references to bruising of K.J.'s back and spine. The issue of jurisdiction was submitted on the social study report, and the juvenile court sustained the petitions as amended. The court (Referee Chrisman) remarked, "The evidence—people say a picture is worth a thousand words and many times it is. These pictures are consistent with the child's statements and various other witnesses. And the pictures show very significant injuries to the child [T.D.] on multiple parts of her body. Not just the eye but the face, the arms, the stomach. There are cuts, as well as bruises. There is a rather significant entire area of her stomach region that is bruised and scratched, and I do find that that supports the [section] 300(a) petition."

At a contested dispositional hearing, mother denied hitting T.D. with a belt. On cross-examination she reiterated, "I don't hit my children." She denied causing any of T.D.'s injuries because, in her view, "they're not injuries." Mother "kn[e]w for a fact" that she did not cause any of the bruising or scratching on T.D.'s face, abdomen, and legs. When asked if she believed T.D. had lied, mother responded, "[T.D.] says she never

told you guys any of [what she later read in the report]. So I can't say whether my daughter lied or not. I would never call my daughter a liar." Mother claimed she does not "have much of a backbone when it comes to disciplining" the children. She insisted the children would be safe if they were returned to her care.

On cross-examination, mother testified that T.D. received the marks viewed by the responding police officer because she is "anemic, and when she sleeps in certain places it happens to her constantly." But mother's testimony was not consistent with what she had told the officer. When the officer remarked that T.D. "had marks on her," mother had told him, "when [T.D.] walked out my door there was not a single mark on [her]." Mother did not explain, either to the officer or at trial, where or when T.D. might have slept after she left the house.

At the conclusion of the contested hearing, the juvenile court (Referee Hertoghe) made a lengthy ruling. The court looked to section 300, subdivision (e) (hereafter section 300(e)) to determine what constitutes severe physical abuse. The court deduced from section 300(e), that a child would "be deemed to have suffered severe physical abuse if there was more than one physical act which causes bleeding, deep bruising and swelling." The court found that the evidence clearly established that T.D. suffered a significant injury in terms of bruising. The court described T.D.'s extensive bruising, particularly on her face. The court considered the implement

(belt) that mother used to inflict the bruising and scratches and determined there was "absolutely no doubt" that mother's actions were deliberate.

The juvenile court stated that it had taken into consideration the specific actions of mother, the photograph of the belt, D.W.'s demonstration for law enforcement of how mother had struck T.D., and T.D.'s statements to law enforcement and the social worker. The court pointed out that there were multiple injuries to T.D. on various parts of her body, caused by multiple swings of the belt.

The juvenile court also considered the circumstances surrounding the incident. The court noted that it arose from a then seven-year-old child's "fairly normal . . . behavior" of taking candy and hiding it from a parent.

The juvenile court found by clear and convincing evidence that it would not benefit any of the children to pursue reunification services with mother. The court agreed with the social worker's assessment that mother's actions demonstrate a lack of impulse control, a lack of judgment, and a lack of compassion towards T.D. The court found it highly unlikely that mother could reunify with the children within 12 months. The court noted that, almost three and a half months after removal, mother appeared "even more entrenched than ever" in a belief that she had never done anything that constitutes inappropriate parenting or discipline. The court stated, "[T]he level of denial that the Court heard on the witness stand is one that is

highly significant and gives the Court no reason to believe that sending the mother to counseling services would be anything other than an act and exercise in futility because [mother] is just simply not open to assessing her role in her children being in out of home placement."

DISCUSSION

Mother contends the juvenile court erred when it bypassed her reunification services. Specifically, she claims (1) she did not inflict the requisite "severe" physical abuse, and (2) she was capable of benefiting from reunification services.² Both claims fail because they presuppose that juvenile court jurisdiction has been established under section 300(e), not, as here, under section 300(a).

I. Severe Physical Abuse

Mother claims the bypass of reunification services was error because the evidence did not show "severe physical abuse" within the meaning of section 300(e).³ The argument fails because section 300(e) does not apply to this case.

² Mother's notice of appeal references the juvenile court case numbers of all three children. However, on the court's own motion the purported appeal as to T.D. (case No. JD231383) was dismissed on June 30, 2011.

³ Section 300(e) provides, in relevant part, that a child is within juvenile court jurisdiction if "[t]he child is under the age of five years and has suffered severe physical abuse by a parent For the purposes of this subdivision, 'severe physical abuse' means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; . . . ; or more than

Section 300(e) states, in relevant part, that, "[f]or the purposes of *this* subdivision," severe physical abuse means "any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; . . . ; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness." (Italics added; see fn. 3, *ante*.) Mother reasons that the physical abuse of T.D. was not "severe" because it did not result in any of the listed conditions.

Mother assumes that section 300(e)'s definition, which was intended to be used for "purposes of this subdivision," somehow applies in the very different context of this case. Her assumption perhaps is understandable because the juvenile court looked to section 300(e) for its definition of "what constitutes severe physical abuse."

However, the juvenile court correctly noted that "the Legislature did not see fit to put the same definition in [section 361.5(b)(6)]," which governs bypass of reunification. Under section 361.5(b)(6), reunification may be bypassed in

one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness;"

cases of "infliction of severe physical harm."⁴ Where, as here, bypass is supported by sufficient evidence of severe physical harm, it is not necessary to consider whether there was also sufficient evidence of severe physical abuse.

Section 361.5(b)(6) provides that, "for the purposes of *this* subdivision," "severe physical harm" means, among other things, "deliberate and serious injury inflicted to or on a child's body or the body of a . . . half sibling of the child by an act . . . of the parent" (Italics added; see fn. 4, *ante*.)

The juvenile court expressly found by "clear and convincing evidence" that "deliberate and serious injury" had been "inflicted to or on" the body of T.D., the half sibling of the other two children. The court found "nothing that gives any credence to the theory that these bruises are caused by anemia

⁴ The first and third paragraphs of section 361.5(b)(6) provide, in relevant part, that reunification services need not be provided when the court finds, by clear and convincing evidence:

"That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of . . . the infliction of severe physical harm to the child, . . . or a half sibling by a parent . . . , as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian. [¶] . . . [¶]"

"A finding of the infliction of severe physical harm, for the purposes of this subdivision, may be based on, but is not limited to, deliberate and serious injury inflicted to or on a child's body or the body of a . . . half sibling of the child by an act . . . of the parent"

or some other medical condition or that they were inflicted by the child herself."

On appeal, mother does not claim the evidence was insufficient with respect to issues of her identity as the inflictor or the deliberate manner of infliction. This leaves the issue of sufficiency of evidence that the bruises were a "serious injury" within the meaning of section 361.5(b)(6).

The juvenile court stated, "When one looks at the implement that was used on the child to cause the bruising and the scratches, it's clear to me that this is a serious injury to this child's face." Mother does *not* challenge this finding on the theory that the child's injury was somehow less than serious.

Instead, mother argues that, unless the bypass exception for cases of "severe physical harm" requires conduct or injury more egregious than the "serious physical harm" required to establish juvenile court jurisdiction (§ 300(a) & (b)), the exception will "swallow the rule" of reunifying parent and child.

However, the exception does not apply unless the juvenile court makes a "factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian." (§ 361.5(b)(6), 1st par.; see fn. 4, *ante*.) Mother does not suggest that this factual finding will be made in all, or most, cases under section 300(a) and (b). Thus, she has not shown any prospect of the exception swallowing the rule.

II. Section 361.5, Subdivision (c)

In an argument that is not a model of clarity, mother claims "the [juvenile] court's section 361.5[, subdivision] (c) finding" (hereafter section 361.5(c))—i.e., that reunification was not likely to be successful—"was erroneous because it did not properly consider all five of the enumerated factors." She concludes her section 361.5(c) argument by claiming that "the evidence before the juvenile court tended to show that Mother could be successful in reunification, and therefore *there was not substantial evidence to support the court's finding that Mother's attitude would prevent her from reunifying with her children.*" (Italics added.)

The Department surmises, and we deduce, that mother's argument refers to the five factors in the fourth paragraph of section 361.5(c) (enumerated in brackets in fn. 5, *post*), which the court may consider in deciding whether reunification services are likely to be successful or unsuccessful.⁵

⁵ The second through fourth paragraphs of section 361.5(c) provide, in relevant part:

"The court shall not order reunification for a parent or guardian described in paragraph . . . (6) [or] (7) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.

"In addition, the court shall not order reunification *in any situation described in paragraph (5) of subdivision (b) unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child*

"[(1)] The failure of the parent to respond to previous services, [(2)] the fact that the child was abused while the

However, as can be seen, the five factors of section 361.5(c) relate to whether reunification is likely to be successful or unsuccessful "*in any situation described in paragraph (5) of subdivision (b)*" of section 361.5. (§ 361.5(c), 3d full par., italics & boldface added; see fn. 5, ante.)

Section 361.5(b)(5) provides that reunification services need not be provided to a parent when the court finds, by clear and convincing evidence, that "the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian." Because, as we have seen, juvenile court jurisdiction over mother was established under section 300(a), not section 300(e), the court's failure to consider the five factors listed in section 361.5(c) could not have been error.

parent was under the influence of drugs or alcohol, [(3)] a past history of violent behavior, or [(4)] testimony by a competent professional that the parent's behavior is unlikely to be changed by services *are among the factors indicating that reunification services are unlikely to be successful.* [And, (5)] [t]he fact that a parent or guardian is no longer living with an individual who severely abused the child may be considered in deciding that *reunification services are likely to be successful*, provided that the court shall consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse." (Italics & boldface added.)

DISPOSITION

In case Nos. JD231381 (K.J.) and JD231382 (D.W.), the findings and orders of the juvenile court are affirmed.

_____, BUTZ, J.

We concur:

_____, HULL, Acting P. J.

_____, MAURO, J.